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COURT OF APPEALS
DIVISION ONE

70704-3

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No. 70704-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAMIEN WILHELM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. **The admission of evidence that the defendant had previously assaulted his girlfriend was prejudicial error requiring reversal of the defendant's convictions.**

Under ER 404(b), evidence of prior crimes, misconduct, or bad acts is generally inadmissible because it has the potential to lead a jury to decide that a defendant committed the offense simply because the defendant had committed similar acts before. State v. Burkins, 94 Wn. App. 677, 687, 973 P.2d 15 (1999). Such evidence, however, may be admissible for other purposes if (1) it is probable the act occurred, (2) the evidence has a legitimate purpose, (3) the evidence is relevant, and (4) the probative value outweighs the danger of unfair prejudice. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Evidence of previous domestic violence may be admissible under ER 404(b) for non-illicit purposes. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996) (evidence admissible for credibility purposes where wife made inconsistent statements to police on whether husband assaulted her and expert testified about domestic violence); State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (evidence admissible for credibility purposes where girlfriend recanted allegations of domestic violence); and State v. Baker, 162 Wn. App. 468, 259 P.3d 270 (2011) (evidence admissible to show motive, lack of accident or mistake, and credibility of witness).

The trial court erred in admitting, under ER 404(b), Wilhelm's prior conviction for assaulting Leah Hensel, his girlfriend. While admitted for "credibility" purposes, whether Hensel was previously assaulted by Wilhelm did not aide the jury in assessing Hensel's credibility; it did not make Hensel's testimony more or less believable. At trial, Hensel consistently testified that she did not remember Wilhelm throwing anything at her in the grocery store. 7/11/13RP 129. This was consistent with the overwhelming evidence that she was heavily intoxicated at the time. 7/11/13RP 64-65, 72, 122, 145, 162, 168; 7/15/13RP 14.

In Grant, Magers, and Baker, the witnesses' credibility were in question because of contradictions they themselves created. Here, any possible contradictions were created by other witnesses. The jury could examine the demeanor of the witnesses and decide which witness was more credible.

For the evidence of a prior assault to bear on Hensel's credibility, one must assume that because Hensel was assaulted before, her current account on whether she was assaulted again is suspect or less credible. Absent some evidence of an inconsistency in Hensel's account, like a recantation, there is no justification for making this assumption. To do otherwise is to adopt some viewpoint about human nature, i.e., that being

subjected to domestic violence makes a person less credible when recounting whether acts of domestic violence occurred.

In an effort to fit this case into existing authority, the State asserts that Hensel's statements to police on the night in question were internally inconsistent and contradictory. Br. of Resp't at 22-23. According to testimony from police officers, Hensel said she was injured from falling and fighting with her friend, Heather Wilmore. 7/11/2013RP 164, 183. She also told police that she would not make a statement because she did not want Wilhelm to get in trouble. 7/11/2013RP164, 183.

These statements are not inconsistent or contradictory to Hensel's testimony. Her testimony at trial was that she did not remember what happened. When she spoke with police she was heavily intoxicated. That she told police something does not mean that she would remember it later.

Hensel's concession that she probably refused to give a statement to police is not contradictory either. A person who lacks memory of an event can logically concede that it is probable the event did or did not happen. Hensel knew she did not want Wilhelm to get into trouble for violating a no-contact order, so she could infer that she likely told police she did not want to make a statement about Wilhelm.

As for the "victim impact" statement from Hensel, the purpose of the statement was to tell the State what she wanted to see happen in the

case. 7/11/2013RP 147-48. The purpose was not to give an account of events. 7/11/2013RP 147. Thus, that Hensel did not write in the statement that she lacked memory about what happened does not contradict her testimony. See Br. of Resp't at 23-24.

Contrary to the State's argument, Hensel's testimony that she wanted Wilhelm to get in the least amount of trouble and that he "get better and whatnot" is not inconsistent with her lack of memory. 7/11/2013RP 120. The prosecutor did not ask Hensel to explain what she meant by "get better." 7/11/2013RP 120. Without any follow up, it is unclear what she meant.

The State asserts that the trial court was in the best position to observe Hensel's testimony and determine if her loss of memory was authentic. Br. of Resp't at 25. This discussion misses the mark. It was the jury's role to decide this factual issue. Further, the court made its ER 404(b) ruling before hearing Hensel's testimony.

The State broadly asserts that whenever an alleged domestic violence victim acts "inconsistently," a defendant's prior domestic violence convictions are admissible to explain the "inconsistency." This is not the test under ER 404(b). The State does not explain how a prior conviction for assaulting Hensel makes her more or less credible.

State v. Dickensen, 48 Wn App. 457, 740 P.2d 313 (1987) does not support the State's argument that Hensel's testimony was inconsistent or contradictory. There, a witness's testimony implicated the defendant in a murder. Dickensen, 48 Wn. App. at 467. Before, however, the witness said that police, not the defendant, had killed her friend. Id. The Court held that the witness's earlier statement was admissible under the test for prior inconsistent statements. Id. at 467-68. The case did not involve lack of memory.

The error in admitting Wilhelm's prior conviction was prejudicial. The evidence of an assault was weak, not overwhelming. The only eyewitness, Heather Wilmore, was intoxicated and uncertain about happened. 7/11/13RP 101, 109. In addition to the weak evidence, the risk that the ER 404(b) evidence would be used unfairly to find Wilhelm guilty was high. Though the court found the probative value outweighed the danger of unfair prejudice, the trial court recognized the danger was still high. 7/9/13RP 62. There is a reasonable probability that evidence of a prior assault tipped the balance. This Court should reverse Wilhelm's convictions.

2. The defendant was deprived of his right to effective assistance of counsel where counsel obtained an instruction telling the jury that the girlfriend's testimony was inconsistent.

In the hopes of preventing any improper use of the prior conviction admitted under ER 404(b), defense counsel obtained a limiting instruction. CP 19; 7/15/13RP 59. The instruction, however, improperly told the jury that Hensel's testimony had inconsistencies. CP 38 ("the prior assault conviction . . . may be considered by you only for the purpose of assessing the credibility of Leah Hensel and explaining the inconsistencies in her testimony.") (emphasis added). Deciding this factual matter for the jury was a judicial comment on the evidence. Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002) ("An instruction improperly comments on the evidence if the instruction resolves a disputed issue of fact that should have been left to the jury.").

Contrary to the State's argument, this instruction plainly told the jury that Hensel's testimony was inconsistent. A person who gives inconsistent testimony is not credible. Therefore, the instruction also told the jury that Hensel was not a credible witness. This was an improper comment on the evidence.

In obtaining this instruction, counsel's performance was deficient and prejudicial. This judicial comment did not aid Wilhelm. If the jury viewed Hensel as a completely non-credible witness, the jury would disbelieve her testimony that she lacked memory on whether Wilhelm assaulted her in the store. The jury would then infer that she was dishonest about her lack of memory. Despite the instruction telling them not to, the jury would logically use this evidence to conclude that Wilhelm had assaulted Hensel. Because the comment hurt Wilhelm's defense and there is a reasonable probability that it affected the verdict, Wilhelm establishes ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (ineffective assistance of counsel requires a showing of deficient performance and resulting prejudice).

The State argues that Wilhelm cannot show prejudice because "Hensel's testimony was, in fact, patently inconsistent." Br. of Resp't at 34. To the contrary, her testimony that she lacked memory was consistent. At the very least, reasonable minds could disagree. Hensel's lack of memory was not implausible. The evidence established she was very intoxicated, explaining her loss of memory.

That the court gave a standard instruction from WPIC 1.02 telling the jury that it is improper for the court to express its personal opinion

about the evidence and disregard such evidence if it did, does not cure the prejudice. There is no way to know if the jury recognized the judicial comment. Further, if WPIC 1.02 could immunize comments on the evidence from being prejudicial, appellate opinions reversing for such comments would not exist.

Wilhelm establishes ineffective assistance of counsel. This Court should reverse.

3. By failing to exercise its discretion in deciding whether to grant the defendant's request to bifurcate the proceeding, the trial court abused its discretion.

Wilhelm moved to bifurcate the proceeding on the violation of the court order charge. 7/9/13RP 47. The State opposed bifurcation and insisted that case law established that it was inappropriate. 7/9/13RP 48. The court agreed with the State and denied the motion. 7/9/13RP 49.

The State and the court misread the law. Case law neither approves nor disapproves of bifurcation in the context where elements of an offense are prior convictions. See State v. Roswell, 165 Wn.2d 186, 197, 196 P.3d 705 (2008); State v. Oster, 147 Wn.2d 141, 143, 52 P.3d 26 (2002). The matter is left to the trial court's wide discretion. State v. Monschke, 133 Wn. App. 313, 334-35, 135 P.3d 966 (2006).

Wilhelm concedes that he had no right to a bifurcated proceeding. What he had the right to, however, was that the trial court fairly consider

his request and exercise its discretion. See Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 320, 976 P.2d 643 (1999) (“Failure to exercise discretion is an abuse of discretion.”). The trial court erroneously believed that the case law was “against” bifurcation. It is not. See Roswell, 165 Wn.2d at 198 (courts have “discretion to reduce unnecessary prejudice where practical.”). Because the trial court failed to exercise its discretion, this court should reverse Wilhelm’s convictions.

The State asserts reversal is not the remedy. Br. of Resp’t at 42. The State cites no authority in support of its contention and appears to be arguing that there is no remedy for the error. Br. of Resp’t at 42. Contrary to the State’s argument, Wilhelm does not need to prove that the Court would have granted his request. He need only prove that the Court failed to exercise discretion that it erroneously believed it did not have. See State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) (a trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is an abuse of discretion that justifies reversal and remand), aff’d, 169 Wn.2d 571, 238 P.3d 487 (2010).

Because Wilhelm establishes an abuse of discretion, this Court should reverse the conviction for violation of a court order.

B. CONCLUSION

The court erred in admitting Wilhelm's prior conviction for assault under ER 404(b). His convictions should be reversed and the case remanded for a new trial. His convictions should also be reversed for ineffective assistance of counsel, abuse of discretion in denying the motion to bifurcate, and prosecutorial misconduct.¹

DATED this 20th day of August, 2014.

Respectfully submitted,



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¹ Wilhelm rests on the arguments presented on prosecutorial misconduct in the opening brief.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70704-3-I
v.)	
)	
DAMIEN WILHELM,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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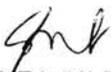
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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 70704-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 21, 2014